

APPENDIX G

Policy or Rulemaking

I. Introduction

The Department can implement Section 180(c) through a Departmental policy, through a rulemaking, or through some combination of the two. Many stakeholders over the years have requested a rulemaking because of concerns that a 180(c) policy that was crafted with extensive stakeholder input could be easily changed with a change of leadership at DOE. Factors for DOE management to consider in their decision are first, the legal and procedural differences between policy-making and rulemaking and, second, the scope of the rulemaking.

II. Background

There is no clear guidance as to when a Federal Agency should issue a policy or a regulation. Executive Order 12866 defines a regulation but does not disallow a policy statement under the same circumstances. It defines “regulation” as “...an agency statement of general applicability and future affect, which the agency intends to have the force and effect of law, that is designed to implement, interpret, or prescribe law or policy or to describe the procedure or practice requirements of an agency.”

Over the years, various stakeholders have urged DOE to promulgate regulations for Section 180(c) instead of issuing a Departmental policy. The states view regulations as a mechanism to ensure stability and continuity in grant implementation through inevitable changes in DOE leadership. The Western States have consistently requested regulations, and the Midwestern States have been strong advocates for modeling 180(c) grants on the Department of Transportation’s Hazardous Materials Emergency Planning (HMEP) grants, which are codified in 49 CFR 110. (However, HMEP did not codify their funding formula, so that they could easily modify the formula later if better risk factors or weighting were demonstrated).

The Department’s *1992 Draft Policy Options* document included rulemaking as one step to implementing Section 180(c). This position changed with the Department’s issuance of the *1996 Notice of Proposed Policy and Procedures*, which said that the program would consider promulgating regulations once the policy was developed and the program neared operation.

The Department’s most recent statement on whether to issue a policy or a regulation was in the *1998 Revised Proposed Policy and Procedures*:

“These policy and procedures will remain in draft form until program progress or legislation provides definitive guidance as to when shipments will commence. At that time, OCRWM may finalize these policy and procedures or will consider promulgating regulations on Section 180(c) implementation. ... OCRWM will continue to monitor other Departmental

transportation programs and may consider updating this Revised Policy as either a Final Policy or as regulations at a later date.”

III. Options Considered

Option 1: Issue a policy

- The advantage of this option is that it is quick and relatively inexpensive.
- The disadvantage is that this option provides no guarantee of continuity through inevitable changes in DOE leadership.
- The state recipients of the grant program do not support this option.

Option 2: Conduct a rulemaking

- This option provides the greatest guarantee of continuity.
- However, the length of the rulemaking process could delay implementation of the 180(c) program.
- This option has some support from recipients.

Option 3: Issue a policy and then promulgate a rule for implementation of some portion of the policy and grant application.

- This option represents a compromise between the two positions, by allowing DOE to implement the 180(c) program without delay while proceeding with the lengthy rulemaking process.
- This option has the broadest base of support from recipients.

The Topic Group also considered the breadth of the rulemaking -- how much of the program should be covered by a rulemaking. A regulation could:

- a) codify all aspects of 180(c) implementation;
- b) codify the process to change the policy but not codify the policy itself, or;
- c) codify the change process and the policy but not the allocation approach.

IV. Recommendation

The Topic Group recommends that DOE follow Option 3: issue a policy and then promulgate a rule for implementation of the policy and grant application.

The Topic Group further recommends that the rulemaking include the key elements of the Section 180(c) program, to include as a minimum all the issues identified by this Topic Group. However, the specific allocation approach should not be codified in the rulemaking, so it can more easily be modified later if needed.

The Topic Group further recommends that DOE announce the timing and scope of the rulemaking by the end of December 2005.